IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No. 167 of 2006

For Approval and Signature:

HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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ALIMAMAD MERSHA SHAIKH - Applicant(s)
Versus
STATE OF GUJARAT - Respondent(s)

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Appearance :
MR JB PARDIWALA for Applicant(s) : 1,
MR MA PATEL, APP for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE AKSHAY H.MEHTA

Date : 10/03/2006

ORAL JUDGMENT

Rule. Service of rule is waived by Mr. MA Patel, Ld. APP for the respondent – State.

At the request of the learned advocates for the parties, the matter is taken up for final hearing today itself.

2. Petitioner is the husband of one Zarina, daughter of Hasambhai Kumbhar. He has in this revision application challenged the order of the Ld. Judicial Magistrate First Class, Rapar, Dist. Kutch, dated 13/2/2006. By the said order the Ld. Magisrate has directed that Zarina, aged 16 years 3 months be sent to Mahila Kalyan Kendra, Bhuj and she be kept there till she attains age of 18 years. It is the say of the petitioner that Zarina is his legally wedded wife and when she is willing to stay with him, such direction cannot be passed by the Ld. Magistrate.

3. I have perused the record of this revision application. It appears that the petitioner and Zarina stayed in the same locality and they developed intimacy, which resulted in Zarina leaving her parents and going to the petitioner on 5/9/2005. They went to Rajkot and on the same day they contracted marriage [Nikah] according to Muslim rites. One Moulvi Jamalsha Kadarsha resident of Rumdin Pari, Pir Dargah Road, Rajkot performed ceremony. It further appears that in the meanwhile, father of Zarina lodged complaint to the District Superintendent of Police, Kutch at Bhuj on 17/9/2005. In pursuance of the said FIR investigation commenced and statements of

Zarina as well as of the petitioner were recorded. It further appears that Zarina expressed her desire to go with her husband i.e. the petitioner, but the Ld. Magistrate, upon application being made by the Circle Police Inspector dated 29/9/2005, directed that she should be sent to Nari Vikas Gruh at Bhuj and her parents were to be informed accordingly. It also appears that the petitioner approached this Court against the said order by filing Special Criminal Application No. 173 of 2006 and the learned Judge passed order dated 8/2/2006 directing the Ld. Magistrate to interrogate Zarina and thereafter to record her wish. Accordingly the Ld. Magistrate interrogated at length Zarina on 10/2/2006 and on the basis of the answers given by her the Ld. Magistrate came to the conclusion that she was a minor and that she was not capable of understanding the responsibility of a marriage. Hence, he directed that she be kept in Mahila Kalyan Kendra at Bhuj. It is this order which is now challenged before me by the petitioner.

4. Mr. JB Pardiwala, learned advocate appearing for the petitioner has submitted that the order of the Ld. Magistrate is per-se illegal because it is against the provisions of the Mahomedan Law. He has further submitted that admittedly the girl is above 15 years of age and, therefore, she is at liberty to marry the petitioner even if there is no consent from the parents. He has submitted that the reason assigned by the Ld. Magistrate to the effect that the

girl is not in a position to understand the consequences of the marriage, is also not proper since the answers given by her to the questions put by the Ld. Magistrate themselves show that she is fully mature and capable of understanding of what she was doing. Mr. Pardiwala has drawn my attention to certain provisions of the Mohamedan law and in particular Articles 251 and 348. He has also placed reliance on the decision rendered by the Patna High Court in the case of Md. Idris v/s. State of Bihar reported in 1980 Cri. L.J. p.764. Mr. MA Patel, Ld. APP has, however, supported the order of the Ld. Magistrate. He has submitted that when the girl is minor i.e. below the age of 18 years, she cannot be permitted to go with the petitioner. He has also submitted that the petitioner is facing prosecution for offences made punishable under sections 363, 366 and 376 of the Indian Penal Code and, therefore, it is desirable that the girl is kept in Mahila Kalyan Kendra till she attains the age of 18 years.

5. I have carefully considered the rival submissions. So far the provisions of Mohamedan law are concerned, Article 251 deals with capacity for marriage. It reads as under :-

> **"251. Capacity for marriage.--** (1) Every Mahomedan of sound mind, who has attained puberty, may enter into a contract of marriage.
>
> (2) Lunatics and minors who have not attained puberty may be

validly contracted in marriage by their respective guardians,

(3) A marriage of a Mahomedan who is of sound mind and has attained puberty, is void, if it is brought about without his consent.

Explanation – Puberty is presumed, in the absence of evidence, on completion of the age of fifteen years."

This provision clearly shows that every Mahomedan who has attained puberty, is capable to validly contract marriage. The explanation of puberty is presumed, in the absence of evidence, on completion of the age of fifteen years. Therefore, every Mahomedan who has attained puberty can enter into a contract of marriage even if there is no consent of the parents or guardians. Further in absence of evidence, puberty can be presumed on completion of the age of fifteen years.

5.1. Article 348 deals with age of majority. It reads as under :-

"**348. Age of majority.-** In this Chapter, "minor" means a person who has not completed the age of eighteen years."

It shows that a person who has not completed 18 years of age is minor. However, in the commentary on the text book Mulla, Principles of Mahomedan Law, 19th Edition, by M. Hidayatullah, it is stated as under :-

"Age of majority under the Mahomedan law.- According to the Islamic

law, the minority of a male or female terminates when he or she attains puberty. Among the Hanafis and the Shias, puberty is presumed on the completion of the fifteenth year. Under the Indian Majority Act (s.3), minority ceases on the completion of the eighteenth year, unless a guardian of the person or property or both of the minor has been or shall be appointed before the minor has attained the age of eighteen years, or the property of the minor is under the superintendence of a Court of Wards, in which case the age of minority is prolonged until the minor has completed the age of twenty-one years.

Under the Mahomedan law any person who has attained puberty is entitled to act in all matters affecting his or her status or his or her property. But that law has been materially altered by the Indian Majority Act, and the only matters in which a Mahomedan is now entitled to act on attaining the age of fifteen years are (1) marriage, (2) dower and (3) divorce. In all other matters his minority continues until the completion at least of eighteen years. Until then the Court has power to appoint a guardian of his person or property or both under the Guardians and Wards Act."

Thus, it is clear that when a person has attained the puberty and when he or she has willingly contracted marriage, it is a valid marriage under Mohamedan Law. This question arose before the Patna High Court and the Division Bench in the case of Moh. Idris [supra] has observed as under :-

"5. So far as the factum of marriage is concerned, I may say at the outset that in the instant case it has not been disputed at any stage. From the order of the learned Sessions Judge, it does not appear that the

petitioner disputed the factum of marriage. His only assertion since the very beginning was that she is below 15 years of age, and, as such, she could not marry without the consent of her guardian. Even before this Court in the writ application there is no assertion that in fact there has been no marriage. This aspect of the matter has been considered by a Bench in the case of Mst. Bashiran v. Mohammad Hussain [AIR 1941 Oudh 284] wherein it was observed :-

> "..... It is well settled that the Indian Majority Act which fixes the age of 18 years, at which a minor becomes a major, exempt marriage and divorce. The result will be that respondent No. 5 on the relevant date may be minor under the Indian Majority Act, or within the meaning of Section 361 of the Indian Penal Code, but certainly she could have married without the consent of her natural guardian. The necessary corollary to this will be that whatever may be the fate of the criminal case, which has been lodged by the petitioner for prosecuting respondent No. 4 for kidnapping, after the marriage, respondent No. 4 will be deemed to be the husband, and as such, entitled to live with respondent No. 5. In such a situation, in my opinion, learned Sessions Judge has not committed any error in directing the release of respondent No. 5 saying that she was at liberty to live with respondent No. 4 whom she claims to have married."

It has further observed as under :-

> "6. I have not been able to appreciate under what provision of law respondent No. 5 was taken in custody because she is not alleged to have committed any offence, and, as such, her detention in custody was

> without any authority in law. We are informed that even today she has been kept in Bihar State [North] Care Home, Patna City-6 under some order passed either by the learned Magistrate or by the Sessions Judge subsequently. As she is not an accused in any case there is no justification for detaining her in any Care Home. She should be allowed to go with respondent No. 4 as directed by the learned Sessions Judge."

The aforesaid observations completely support the submission advanced by Mr. Pardiwala. Considering the provisions of law as well as the ratio laid down by the Division Bench of Patna High Court, I also accept the said submission of Mr. Pardiwala. The sum total of aforesaid discussion on Articles 251 and 348 of The Mahomedan Law is that for the purpose of contracting marriage a person is considered to be major when he or she attains puberty and such person can contract marriage even without the consent of the guardian if he or she is of sound mind and not lunatic. In absence of any evidence, puberty can be presumed on completion of the age of fifteen years.

5.2. Thus, so far the impugned order is concerned, it is the conclusion drawn by the Ld. Magistrate that she is minor and she is required to be sent to Mahila Kalyan Kendra, is not proper.

5.3. The second reason that is given by the Ld. Magistrate is that she is not capable of understanding the responsibility arising under the marriage. I

have closely perused the answers given by Zarina. It forms part of record of this revision application. The answers given by her clearly show that she is of completely sound mind and capable of fully understanding the consequences of her act. The gist of her answers is that the petitioner and she were known to each other for quite some time and they had developed intimacy and since her father wanted her to marry some one else, she had run away with the petitioner and had married to him. Merely because the place at which the Nikah was performed and the persons who were present at the time of Nikah ceremony were not known to her, it cannot be said that she is not capable of understanding the consequences of her act. The record shows that she was taken to Rajkot where some of the friends of the petitioner were present. She does not belong to Rajkot. Therefore, there is every possibility that the place, the persons and the priest may be strangers to her. On that count the conclusion drawn by the Ld. Magistrate does not appear to be just and proper.

5.4. So far the submission of Mr. Patel with regard to prosecution of the petitioner is concerned, it has got no bearing on the issue before me. Even if the prosecution is legal, it will take its own course and the petitioner will have to face the trial. For the present, it clearly appears that the impugned order is erroneous and it is required to be quashed and set aside and it is hereby quashed and set aside. The Ld. Magistrate is now directed to allow girl Zarina to with

the petitioner and to facilitate her going with the petitioner. Ld. Magistrate is also directed to issue appropriate Yadi to the said Mahila Kalyan Kendra, Bhuj for releasing Zarina within 7 days from the date of receipt of writ of this order.

In the result, application is allowed. Rule is made absolute. D.S. Permitted.

[Akshay H Mehta, J.

* Pansala.